

**NOT FOR PUBLICATION**

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CONCURRING AND DISSENTING OPINION BY WATANABE, J.,  
WITH WHOM ACOBA, J., JOINS

I agree with the majority that we lack jurisdiction over the appeal of Purchasers-Appellants Wayne Slagle and Sheila Slagle (the Slagles) from the January 31, 2003 order of the Circuit Court of the First Circuit (the circuit court), denying the Slagles' motion for attorney fees and costs (the January 31, 2003 order). The Slagles' motion for attorney fees and costs related to the December 12, 2002 order of the circuit court, denying Plaintiff-Appellee Homeside Lending, Inc.'s motion to cancel the sale of property purchased by the Slagles at a foreclosure sale, which was never certified as a final judgment pursuant to Hawai'i Rules of Civil Procedure (HRCP) Rule 54(b). In light of Fujimoto v. Au, 95 Hawai'i 116, 136 n.16, 19 P.3d 699, 719 n.16 (2001), the January 31, 2003 order was clearly not appealable.

I am not prepared at this time, however, to conclude as the majority does that no appeal can lie from the January 31, 2003 order, "[a]bsent the entry of an appealable final deficiency judgment[.]" Majority opinion at 2. In foreclosure cases, especially where the party being foreclosed on has had his or her debts discharged in bankruptcy, it may be futile for a lending institution to seek a deficiency judgment against the party. In such instances, I do not believe it would necessarily constitute an abuse of discretion for the circuit court to certify an order denying a motion to cancel sale as an HRCP Rule 54(b) final

judgment, thus allowing an appeal of an order regarding attorney fees and costs arising from the HRCP Rule 54(b) final judgment. In my opinion, the majority's order dismissing the Slagles' appeal is unnecessarily broad.